No. 80-298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROGER D. MONROE,

Petitioner,

v.

THE STANDARD OIL COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE CUMMINS ENGINE COMPANY, INC.

MARTIN J. KLAPER
DAVID L. GRAY
111 Monument Circle
Indianapolis, Indiana 46204
(317) 635-1213
Attorneys for Amicus Curiae Cummins Engine Co., Inc.

ICE, MILLER, DONADIO & RYAN
Of Counsel

Midwest Law Printing Co., Chicago 60601, Financial 6 3988

TABLE OF CONTENTS

PAGE

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT:

Section 2021(b)(3) Only Applies To A Reservist While On The Job Between Periods Of Military Duty And Does Not Govern The Time Period A Reservist Is Absent Because Of Military Duty Or The Rights And Benefits To Which He Is Entitled Upon His Return 4

Section 2021(b)(3) Does Not Require "Affirmative Action" Or "Reasonable Accommodation" Of A Reservist's Schedule But Requires Only Neutral, Nondiscriminatory Treatment By Employers 11

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Carlson v. New Hampshire Department of Safety, 609 F.2d 1024, *cert. denied*, 446 U.S. 913 (1980) 21

Carney v. Cummins Engine Company, 602 F.2d 763 (7th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980) 2, 19, 21

Day-Brite Lighting v. Missouri, 342 U.S. 421 (1952) .. 20

Dean v. Gadsden Times, 412 U.S. 543 (1973) 20

Fishgold v. Sullivan Drydock and Repair Corp., 328 U.S. 275 (1945) 10

Jarecki v. G. D. Searle Co., 367 U.S. 303 (1961) 10

Kokoszka v. Belford, 417 U.S. 642 (1974) 10

MacEvoy v. United States, 322 U.S. 102 (1944) 10

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) .. 19

Pete v. United States, 531 F.2d 1018 (Ct. Cl. 1976) 19

Philbrook v. Glodgett, 421 U.S. 707 (1975) 10

West v. Safeway Stores, Inc., 609 F.2d 147 (5th Cir. 1980) 19, 20

White v. Associated Industries of Alabama, Inc., 373 So.2d 616 (Ala. 1979) 19, 20

Other Authorities

38 U.S.C. § 2012 17

38 U.S.C. § 2021 *et seq.* ..... *passim*

38 U.S.C. § 2022 *et seq.* 19

38 U.S.C. § 2024 *et seq.* 2, 3, 5, 6, 10, 18, 21

1951 U.S. Cong. & Admin. News 84, 1502 5

1955 U.S. Cong. & Admin. News 676, 2816 5

1960 U.S. Cong. & Admin. News 531-532, 3078 5

Employment and Earnings, U.S. Department of Labor, Bureau of Labor Statistics, Vol. 27, No. 11 (November 1980) 19

H.R. Rep. No. 1303, 90th Cong., 2d Sess. (1968) 7, 8

H.R. Rep. No. 1303, 89th Cong., 2d Sess. (1966) 12, 13

H.R. 11509, 89th Cong., 2d Sess. (1966) 12

Official Guard and Reserve Manpower Strength and Statistics Office, Deputy Secretary of Defense (Reserve Affairs) Report No. 1147/1148 (October 1980) 19

S. Conference Report No. 93-1240, 93rd Cong., 2d Sess. (1974) reprinted at 1974 U.S. Cong. & Admin. News at 6343-6344 17

S. Rep. No. 1477, 90th Cong., 2d Sess. (1968) reprinted at 1968 U.S. Cong. & Admin. News 3421 ..... 6, 7, 18

SUBCOMMITTEE NO. 3 CONSIDERATION OF H.R. 1093, TO AMEND AND CLARIFY THE REEMPLOYMENT PROVISIONS OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT, AND FOR OTHER PURPOSES, 90th Cong., 2d Sess. (1968) 8, 9, 10, 13, 16

SUBCOMMITTEE NO. 3 CONSIDERATION OF H.R. 11509, TO AMEND AND CLARIFY THE REEMPLOYMENT PROVISIONS OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT, AND FOR OTHER PURPOSES, 89th Cong., 2d Sess. (1966) 13, 14, 15, 16

Webster's New Collegiate Dictionary (Merriam, 1977) at 304 11

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BRIEF OF AMICUS CURIAE CUMMINS ENGINE COMPANY, INC.

INTEREST OF AMICUS CURIAE

Cummins Engine Company, Inc., a manufacturer of diesel engines, employs a substantial number of reservists and National Guardsmen and encourages its employees to participate in such activities. As an employer, Cummins has a direct stake in this Court's interpretation of 38 U.S.C. § 2021(b)(3). Cummins was involved in one of the cases conflicting with the decision

below, *Carney v. Cummins Engine Company*, 602 F.2d 763 (7th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). Cummins is filing its brief in support of respondent, The Standard Oil Company.

SUMMARY OF ARGUMENT

Petitioner is before this Court seeking payment for regular hours he missed while absent on reserve duty. The Sixth Circuit dismissed petitioner's complaint. That dismissal should be affirmed.

Congress' efforts in the field of reservists' and National Guardsmen's reemployment rights have been marked by its efforts to provide them the rights as veterans commensurate with the length of the reservists' or Guardsmen's absences. By 1968, when § 2021(b)(3) was enacted, Congress had acted so as to provide most of the rights of veterans to reservists and Guardsmen.

Prior to the enactment of § 2021(b)(3), the major difference between the rights of veterans and those of reservists was in the amount of job protection provided after returning to civilian employment. Veterans were provided one year of protection (§ 2021(b)(1)) as were reservists or Guardsmen on active duty (§ 2024(b)(1)). Reservists or Guardsmen returning from their initial active duty training were given six months protection from discharge (§ 2024(c)). However, while reservists or Guardsmen returning from other training duty were required to be reinstated to their positions (§ 2024(d)), they had no fixed period of protection after their return and were, therefore, subject to intentional discrimination or discharge by their employers.

Congress, recognizing that a fixed period of protection after each absence would be impractical because of the recurring absences of the reservist or National Guardsman, passed § 2021(b)(3). This provision prohibits discharge or discrimination against reservists while they are on the job between absences for training duty.

Petitioner seeks to apply § 2021(b)(3) to the period of his absence and to have it interpreted to require affirmative action so as to receive payment for regular hours he missed during Reserve absences. However, the legislative history of § 2021(b)(3) demonstrates: (1) that Congress did not intend to disturb the application of § 2024(d) to the time period of the reservists' or Guardsmen's absences; (2) that § 2021(b)(3) applies only when the reservist is on the job between absences; and (3) that § 2021(b)(3) requires only neutral, nondiscriminatory treatment.

Accordingly, the decision of the Sixth Circuit dismissing petitioner's Complaint should be affirmed.

ARGUMENT

Section 2021(b)(3) Only Applies To A Reservist While On The Job Between Periods Of Military Duty And Does Not Govern The Time Period A Reservist Is Absent Because Of Military Duty Or The Rights And Benefits To Which He Is Entitled Upon His Return.

Petitioner seeks payment for regular hours which he did not work because he was absent on reserve duty. He seeks such relief on the basis that Standard Oil's failure to rearrange his work schedule violated 38 U.S.C. § 2021(b)(3). The District Court rendered judgment for petitioner on the basis that § 2021(b)(3) requires affirmative action by employers. The Sixth Circuit reversed the District Court and dismissed petitioner's complaint on the basis that § 2021(b)(3) requires only neutral, nondiscriminatory treatment. Petitioner seeks reversal of that dismissal on the basis that (i) § 2021(b)(3) of the Act applies and (ii) that it requires an employer to take affirmative action to guarantee rights and benefits arising during his absence. Petitioner is wrong on both counts. Section 2021(b)(3) is satisfied by neutral treatment of reservists *vis-a-vis* other employees. Furthermore, that section only applies to incidents or advantages of employment occurring while the reservist is on the job between periods of military duty and does not apply to the time a reservist is absent because of military duty.

A review of the history of the legislation establishing the rights of reservists and National Guardsmen shows that, beginning in 1951, Congress has legislated in such a way as to mimic for reservists and Guardsmen the protections afforded veterans where that was possible and to approximate those protections where duplication was impossible. Thus, in 1951, in enacting the Universal

Military Training and Service Act the Congress added a provision (now codified at 38 U.S.C. § 2021 *et seq.*) extending to reservists the reemployment protections of the Act, provided they made application for reinstatement within 30 days. 1951 U.S. Cong. & Admin. News 84, 1502.

Similarly, in enacting the Reserve Forces Act of 1955 providing for special Reserve enlistment programs, Congress provided reemployment rights "substantially the same . . . as [given to] persons on active duty. . . ." so as to "fit the trainee into the general pattern of reemployment rights guaranteed prior-service men and insure that such rights shall be commensurate with their period of duty." 1955 U.S. Cong. & Admin. News 676, 2816.

In 1960, Congress revised the provisions of what is now 38 U.S.C. § 2024(c) to equalize the reemployment rights of reservists and National Guardsmen on identical training assignments. In addition, Congress enacted what is now Section 2024(d) to "provide reemployment protection for trainees who are absent from employment for only a short period of time . . . up to 90 days. 1960 U.S. Cong. & Admin. News 531-532, 3078.

Section 2024(d), along with § 2024(b)(1) and (c), provides a comprehensive regulation of the reemployment rights of reservists and National Guardsmen designed to equalize their rights with veterans, taking into account the period of their absence. Thus, reservists called to active duty other than for training are given the same reemployment rights as returning veterans, including the one-year protection against discharge (38 U.S.C. § 2024(b)(1)). Reservists called to active duty training not exceeding 3 months are given all

of such rights, except the protection against discharge is reduced to 6 months (38 U.S.C. § 2024(c)). Finally, reservists on weekend or annual summer training or on inactive duty training are given leave of absence rights and the rights of veterans, except there is no fixed period of protection against discharge after the reservist's return to work and the reservist must report back to work as soon as possible. In addition, there is a prohibition against charging training time against a reservist's vacation rights (38 U.S.C. § 2024(d)).

It was against this statutory background that Congress considered and enacted 38 U.S.C. § 2021(b)(3) in 1968. The legislative history of that provision, when viewed against that background, demonstrates that § 2021(b)(3) was not meant to govern the rights of reservists or National Guardsmen with respect to the time period of their absences for military service or to govern their reinstatement but, instead, was meant to protect them while on the job against employer discrimination because of either their past or prospective absences for military duty.

The Senate Report on H.R. 1093, the bill which added Section 2021(b)(3), states that the purpose of the bill was "to prevent reservists and National Guardsmen not on active duty who must attend weekend drills or summer training from being *discriminated against* in employment because of their Reserve membership. . . ." (Emphasis added.) The Senate Report further states that discrimination against reservists had become an increasing problem, *particularly denial of promotions or discharge*, and that the bill was meant to protect against such discriminatory practices by providing that "reservists [would] be entitled to the same treatment afforded their co-workers not having such military obligations"

(emphasis supplied). S. Rep. No. 1477, 90th Cong., 2d Sess. (1968) reprinted at 1968 U.S. Cong. & Admin. News 3421.

The chart printed in the Senate Report, 1968 U.S. Cong. & Admin. News at 3425 (and also in H.R. Rep. No. 1303, 90th Cong., 2d Sess. (1968)), detailing the effect of H.R. 1093—adding Section 2021(b)(3)—noted that under then existing law reservists or National Guardsmen on other than initial active duty training had no job protection. This is in contrast to the fixed periods of job protection granted for other types of military duty. The chart then notes that under H.R. 1093 reservists or National Guardsmen in that situation would be granted "Job Protection" by the prohibition against "Discharge from or discrimination in employment because of membership in [the] reserve or National Guard."

The House Report also documents that Congress intended § 2021(b)(3) to be a substitute for a fixed period of job protection after return from military duty. It explained the purpose of H.R. 1093 as follows:

> **Job Protection for Employees with Obligations as Members of a Reserve Component of the United States.**
>
> . . .
>
> Section (1) amplifies existing law to make clear that reservists not on active duty, who have a remaining Reserve obligation, whether acquired voluntarily or involuntarily, will nonetheless not be discriminated against by their employees [sic] solely because of such Reserve affiliation.
>
> It assures that these reservists will be entitled to the same treatment afforded their co-workers without such military obligation.

> The law does not now protect these reservists against discharge without cause, as it does with inductees and enlistees, who have 1-year protection, and initial active duty for training reservists, who have 6 months' protection. H.R. Rep. No. 1303, 90th Cong., 2d Sess. (1968) at 3.

These statements from the legislative history show that § 2021(b)(3) was meant to take the place of a fixed period of protection against discharge and to protect the reservist from employer discrimination while on the job between periods of military duty because of his Reserve obligations. These statements also show that § 2021(b)(3) was not intended to affect the already detailed statutory scheme of leave of absence rights and guarantees of seniority, status, pay and vacation upon return from military training duty.

The testimony of Hugh W. Bradley, Director, Office of Veterans' Reemployment Rights, U.S. Department of Labor (which drafted the bill, H.R. Rep. No. 1303 at 7) also demonstrates that Section 2021(b)(3) was intended to take the place of a fixed period of protection. His testimony before the subcommittee of the Committee of Armed Services considering H.R. 1093 was as follows:

> The first provision of the bill deals with a problem that has been increasingly difficult in the past few years. It is designed to enable reservists and guardsmen who leave their jobs to perform training in the Armed Forces, to retain their employment and to enjoy all of the employment opportunities and benefits accorded their co-workers who do not have military training obligations. *The law does not now protect them against discharge without cause as it does inductees and enlistees, who have one year protection, and initial active duty for training reservists, who have 6 months protection.*

> *To give the reservist a specific period of protection after each tour of training duty would be to perpetuate him in his position indefinitely. The new Section 9(c)(3), which the proposed amendments would add to the Act, would not follow this approach but instead provides that an employee shall not be denied retention in his employment or any promotion or other incident or advantage of employment solely because of any obligation as a member of a reserve component of the Armed Forces.* I recommend approval of this provision. (Emphasis added.)

SUBCOMMITTEE NO. 3 CONSIDERATION OF H.R. 1093, TO AMEND AND CLARIFY THE REEMPLOYMENT PROVISIONS OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT, AND FOR OTHER PURPOSES, 90th Cong., 2d Sess. (1968).

This purpose was also reflected in the statement before the House subcommittee of the Director of the National Economic Commission of the American Legion:

> The American Legion feels very strongly that employees with reserve obligations who are members of the National Guard and the Reserves *should not be denied retention in employment or promotional opportunities* solely because of their participation in the Reserve Training Program. They should be afforded all the employment opportunities and benefits as those who do not have training obligations. *The Reemployment Rights Statutes do not now protect National Guard members and Reservists as it does inductees and enlistees, who have one-year protection, and initial active duty for training reservists who have six-months protection.*
>
> *H.R. 1093 would add a new section, 9(c)(3),* under the reemployment provisions of the Universal Military Training and Service Act *which would prevent discharge* from employment *without cause* because of membership in the National Guard or Reserves, *and would also prevent discrimination in*

> *such areas as promotion, training opportunities and pay increases.* (Emphasis added.)

Id. (Statement of Austin E. Kerby.)

In short, the legislative history of the Act and of Section 2021(b)(3) confirms that such section was added by Congress to cover an area not already statutorily regulated—job protection for reservists and National Guardsmen while at work and between periods of training duty other than initial active duty training (Pet. App. at 5a). Section 2021(b)(3) was not meant to affect the already detailed statutory scheme of leave of absence rights and reinstatement rights.[1]

Since the petitioner is not seeking redress for a denial of an incident or advantage of employment which occurred while he was at work and *between* absences for training duty but is seeking pay for time missed from work while *on* training duty, the legislative history of the Act precludes the application of § 2021(b)(3) to such a claim which, instead, is governed exclusively by § 2024(d). And, as correctly noted by the Court below, [Pet. App. at 8a] § 2024(d) "does not require employers to pay absent reservists for hours not worked" since such a right is not an aspect of "seniority, status, pay or vacation" as guaranteed by that section.

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[1] Indeed, since § 2021(b)(3) protects *all* "incidents or advantages of employment" including "seniority, status, pay and vacation" its application to the period of the reservist's absence would render § 2024(d) entirely meaningless and without effect. Such a construction would violate this Court's commands as to the proper construction of the Act. *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 285 (1945); *Cf. Kokoszka v. Belford*, 417 U.S. 642, 652 (1974); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Jarecki v. G. D. Searle Co.*, 367 U.S. 303 (1961); *MacEvoy v. United States*, 322 U.S. 102, 107 (1944). However, each section can be given full application when each is applied in its proper time period.

Section 2021(b)(3) Does Not Require "Affirmative Action" Or "Reasonable Accommodation" Of A Reservist's Schedule But Requires Only Neutral, Nondiscriminatory Treatment By Employers.

Even if the legislative history of the Act supported the application of § 2021(b)(3) to the petitioner's claim for regular time missed during his Reserve absences, the result reached by the Court below is correct.

As set out above, the legislative history of § 2021(b)(3) amply documents that Congress' intention was to prevent *discrimination* by employers *against* reservists or National Guardsmen because of their Reserve obligations. This purpose is supported by the plain language of the statute that a reservist "shall not be *denied* . . ." any incident or advantage of employment. (Emphasis supplied).[2]

Petitioner and the government do not allege that Standard Oil discriminated against him in connection with his work schedule. Instead, they allege only that Standard Oil did not take "affirmative action" to "reasonably accommodate" petitioner so as to schedule petitioner's work days to avoid any lost time. (Pet. at 3, 4, 8, 9, Pet. Brief at 23-24). However, petitioner and the government point to nothing in either § 2021(b)(3) or in its legislative history indicating that Congress ever even considered imposing upon employers a duty of "affirmative action" or "reasonable accommodation." Indeed, the only language suggested by petitioner to support such a theory is a phrase contained in the legislative history of

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[2] Contrary to the argument made by petitioner and the government (Pet. Brief at 12), the use of the word "denied" in § 2021(b)(3) does connote "intent" as a prerequisite to violation of the statute. "Webster's New Collegiate Dictionary" (Merriam, 1977) at 304.

a nearly identical prior bill (H.R. 11509, 89th Cong., 2d Sess. (1966)), not enacted by Congress, suggesting that employers have a *moral* obligation to see that a reservist's economic well-being is disrupted as minimally as possible.[3] However, that language does not support a finding that Congress intended Section 2021(b)(3) to convert a moral obligation not to discriminate into a *legal* duty to take affirmative action in favor of reservists. Moreover, *that phrase was deleted* from the legislative history of the Act as passed.

When read as a whole, the legislative history of H.R. 11509 demonstrates that Congress was concerned with intentional discrimination against the reservist while at work and not with changing the scheme of reemployment rights already in existence dealing with the period of the reservist's absence on military duty. For example, the House Report on H.R. 11509 provided:

> The law does not now protect these reservists *against discharge without cause* as it does with inductees and enlistees, who have 1-year protection, and initial active duty for training reservists, who have 6 months' protection.
>
> To give the reservist a specific period of protection after each tour of training duty would be to perpetuate him in his position indefinitely. The new section 9(c)(3), which the proposed amendments would add to the act, would not follow this approach but instead provides that an employee shall not be denied retention in his employment or any promotion or other incident or advantage of employment solely because of any obligation as a member of a Reserve component of the Armed Forces.

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[3] H.R. 11509 was identical with H.R. 1093 with respect to what became § 2021(b)(3). It passed the House but not the Senate in 1966 and was reintroduced and passed by both Houses in 1968 as H.R. 1093.

H.R. Rep. 1303, 89th Cong., 2d Sess. (1966) at 3. Further, in describing the effect of H.R. 11509 on existing law, the Report provided:

> It should be noted that *the only substantive changes in existing law relate to the additional period of military service which would be covered and the prohibition against employer discrimination against reservists who participate in the Reserve or National Guard programs.*

Supra, at 4 (Emphasis supplied).

The testimony before the subcommittee of the Committee on Armed Services considering H.R. 11509 also demonstrates Congress' concern with the period *between* Reserve absences. Hugh W. Bradley testified before the subcommittee in substantially the same manner as he did on H.R. 1093 two years later.[4]

In addition, Rear Admiral Burton H. Shupper testified on behalf of the Department of Defense as follows:

> The other aspect of H.R. 11509 is the provision that employees shall not be denied retention in employment or advantages of employment because of any obligation as a member of a Reserve component of the Armed Forces. *After the Berlin and Cuba callups we received information from our Reserve community that a significant number of reservists*

[4] A review of Mr. Bradley's testimony before the subcommittee on H.R. 11509 shows that he was the source of the "moral obligation" language in the Committee report. SUBCOMMITTEE NO. 3 CONSIDERATION OF H.R. 11509 TO AMEND AND CLARIFY THE REEMPLOYMENT PROVISIONS OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT, AND FOR OTHER PURPOSES, 89th Cong., 2d Sess. (1966). Statement of Hugh W. Bradley) However, his testimony before the subcommittee in 1968 did not make any reference to such a *moral* obligation and no reference was made to any such obligation in the legislative history of H.R. 1093. SUBCOMMITTEE NO. 3 CONSIDERATION OF H.R. 1093, *supra*.

> *were receiving indications that opportunities for advancement and retention in civilian employment would favor those who appear to offer their employers more continuity of services, namely those in the Standby Reserve or those with no Reserve status.* . . . (Emphasis added.)

SUBCOMMITTEE NO. 3 CONSIDERATION OF H.R. 11509, TO AMEND AND CLARIFY THE REEMPLOYMENT PROVISIONS OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT, AND FOR OTHER PURPOSES, 89th Cong., 2d Sess. (1966).

Moreover, the statements made by Congressman Hall during his questioning of Admiral Shupper demonstrate the concern with discriminatory discharge:

> Mr. Chairman. I have been cognizant of this problem for a long time . . . as a result of complaint of some of the reservists in my district. I think I could document many letters referring to what the admiral mentioned after the Berlin callup: *corporations of national stature who happen to be located in the district that I represent were found easing out or dropping people in Ready Reserve status. This of course has flared into the open again as a result (a) of the Navy and Marine Corps involuntary or voluntary extensions and (b) because of the possibility of a general callup.* . . .
>
> And *I don't have much respect for big national corporations that are weeding out reservists who participate in a Ready Reserve. This bill would help to correct that, that is why I am for it.* . . . *Supra,* (Emphasis added.)

This concern was also reflected in the questioning of Mr. Bradley by Mr. Slatinshek, counsel for the subcommittee:

> Mr. Slatinshek. I have one other question concerning the language in the first change that you propose in the bill, and this relates to the term

"obligation" of a member of a Reserve component. *This is the change that you propose to provide job retention rights to reservists who are presumably on inactive duty and who participate in drills and who participate in training operations and this is to preclude the employer from arbitrarily discharging them because of their Reserve affiliation. . . .*

Can you tell the committee whether the term "any obligation as a member of a Reserve component" is limited to the statutory Reserve obligation which, as we all know, is the 6-year period, or does this extend beyond that?

Mr. Bradley. *This covers all reservists and guardsmen who are covered in section 9(g)(4) of the act,* which means that the ready reservist would be covered just like the active reservist.

Mr. Slatinshek. In other words *this language here would provide job retention rights, if you will, to a reservist who has satisfied his statutory Reserve obligation but who voluntarily participants* [sic] *in the Reserve program. . . .*

Mr. Bradley. *That is correct,* anyone in any Reserve component or the National Guard, irrespective of whether it is active or inactive Reserve duty, or, as you say, Ready Reserve, is covered in 9(G)(4) and would be covered in this amendment.

Mr. Slatinshek. Let's assume again for the record that I am an employee of a defense industry, an aircraft company, and I have a very responsible position and my employer—and at the same time I am a member of the Reserve. *My employer feels that my Reserve participation is affecting his capabilities and requests or directs that I leave the Reserve program and in the absence of my doing so that he, of course, will discharge me from my employment.* Under the circumstances that I have related, do you feel that you could properly employ the provisions of this law to restore him to his job in the absence of any showing that the discharge of the employee

> was due to something other than his Reserve affiliation?
>
> Mr. Bradley. Well, there would have to be some evidence that the discharge was due to his military obligation. *We run into this very frequently right now as a matter of fact.*

Supra, (Emphasis added.)

Thus, read in context, the legislative history of H.R. 11509 is ample evidence of Congress' concern with the problem of intentional discharge of or discrimination against reservists while at work between periods of military duty.[5] There is nothing to indicate that Congress intended to change the already existing scheme governing the period of the reservist's absence and his return to work—much less to create an "affirmative action" or "reasonable accommodation" obligation with respect to that time period—as suggested by

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[5] Contrary to the assertion by Petitioner and the Government (Pet. at 7, Brief at 15) the Senate Report shows Congress' focus on intentional discrimination (discharge and denial of promotion) as does the testimony of Mr. Bradley, and Admiral Shupper and the comments by Congressman Hall. That testimony and Congressman Hall's comments—specifically about the Berlin and Cuban call-ups and the Vietnam crisis—also belie the assertion that such intentional discrimination "will occur only rarely" (Pet. at 7). In fact, § 2021(b)(3) was passed at a time when the threat of a general callup (like those in the Berlin and Cuban crisis) was very real with the attendant threat of widespread intentional discrimination of the type seen in past mobilizations.

It should also be noted that in Mr. Bradley's testimony before the subcommittee on H.R. 1093 in 1968 he specifically stated that *the testimony given in 1966 on H.R. 11509 applied with full force to H.R. 1093.* SUBCOMMITTEE NO. 3 CONSIDERATION OF H.R. 1093, *supra.*

petitioner and the government and adopted by the Fifth and Seventh Circuits.[6] Rather, as found by the Court below:

> "The legislative history clearly states that section 2021(b)(3) is aimed at combatting discriminatory practices of employers. To this end, section 2021(b)(3) was enacted to ensure that reservists would be 'entitled to the same treatment afforded their co-workers not having such military obligations.' S. Rep. No. 1477, *supra*, at 3421 . . . not [ ] subjected to on-the-job bias by their employers because of their prospective military obligations." (Pet. App. at 11A).[7]

Not only is petitioner's and the government's position without support either in the legislative history or the

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[6] The language of 38 U.S.C. § 2012 and its legislative history (S. Conference Report No. 93-1240, 93rd Cong., 2d Sess. (1974) reprinted at 1974 U.S. Cong. & Admin. News at 6343-6344) imposing an express affirmative action requirement upon employers *vis-a-vis* Vietnam era and handicapped veterans demonstrates that Congress is explicit when creating such an obligation.

[7] If Section 2021(b)(3) were applicable to the time period of a reservist's absence the question to be asked in assessing petitioner's right to relief would be whether Standard Oil discriminated against him because of his Reserve status. An examination of the record discloses that it did not. Paragraphs 9, 10, 11, and 12 of the Stipulation of Facts before the trial court (JA at 25-26) show that petitioner was treated exactly the same as other employees without reserve obligations with respect to scheduling and with respect to the right to switch assignments with other workers in the event of a conflict. Nothing in the record would support a finding that Standard Oil discriminated against petitioner in any of these regards. Instead, as fully appears from the record and petitioner's brief, his only complaint is that Standard Oil did not take affirmative action to minimize any scheduling conflicts from his Reserve duties. Since the Act imposes no such obligation upon Standard Oil, whether or not § 2021(b)(3) is applied, the Sixth Circuit was correct in dismissing petitioner's complaint.

plain language of the statute, but it would result in onerous and unconstitutional burdens being placed upon reservists' employers.

The petitioner argues that § 2021(b)(3) requires employers to treat reservists absent on Reserve duty as if they were constructively present on the job. (Pet. at 8-9, Brief at 23-24). Thus, petitioner contends that if he would have had the right to work 40 hours had he not been absent on Reserve duty, Standard Oil must afford him that right notwithstanding his absence on the theory that to do otherwise would be a "den[ial] . . . of an incident or advantage of employment" because of his reserve obligations.

This case involves absences for weekend duty. However, the statutory language is not so limited ("*any* obligation") and the legislative history makes it clear that it was meant to apply, at least, to absences for the annual two-week training period (1968 U.S. Cong. & Admin. News at 3421). Accordingly, if petitioner's position were accepted by this Court, employers would be required to treat reservists and National Guardsmen absent on the annual two-week training period and for even longer periods of training[8] as if they were present at work during their absence. Under petitioner's and the government's theory, such reservists and National Guardsmen would be entitled to all "incidents and advantages of employment" accorded during their absence to

[8] In fact, the testimony of Mr. Bradley in 1966 (*infra* at 15) makes it clear that § 2021(b)(3) was meant to protect reservists from discrimination for at least all obligations governed by what was then 9(g)(4) of the Act (now codified as 38 U.S.C. § 2024(d)). As mentioned *infra* at 5, the legislative history of *that* provision shows it was meant to govern inactive or active duty training of up to 90 days.

other working employees, including regular time and overtime opportunities. *Cf. West v. Safeway Stores, Inc.*, 609 F.2d 147 (5th Cir. 1980); *Carney v. Cummins Engine Co.*, 602 F.2d 763 (7th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). Many of such "incidents or advantages of employment" including regular time would not be subject to being made up and employers would be required to pay for such incidents or advantages. Such payment would be required at least for the regular time missed during the annual two-week training session. This would result in payments by employers to reservists and National Guardsmen of approximately $700,000,000.00 annually[9] for such regular hours and potential back pay liability in the billions of dollars extending back to 1968.[10] Since employers receive no benefit from such direct payments not received by the public at large (e.g., increased military preparedness through encouraging membership in the Reserve and National Guard) requiring them to bear such huge direct payments would constitute a "taking" for a public purpose without just compensation in violation of the Fifth Amendment to the United States Constitution. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Pete v. United States*, 531 F.2d 1018, 1034-1035 (Ct. Cl. 1976); *Cf. White v.*

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[9] Based upon Total Ready Reserve Strength of 1,270,690 in October 1980, *Official Guard and Reserve Manpower Strength and Statistics Office, Deputy Secretary of Defense (Reserve Affairs)* Report No. 1147/1148 (October 1980) at 8, and applying October 1980 figures for average hourly wages for production and non-supervisory workers of $6.81 per hour. *Employment and Earnings*, U.S. Department of Labor, Bureau of Labor Statistics, Vol. 27, No. 11 (November 1980) at 104.

[10] There is no statute of limitations contained in the Act, and § 2022 forbids the application of a state statute of limitations.

Associated Industries of Alabama, Inc., 373 So.2d 616 (Ala. 1979).[11]

Recognizing the constitutional problems from such a construction, petitioner, the government, and the Fifth Circuit (*West v. Safeway Stores, Inc.*, 609 F.2d 147 (1980)) have argued that, notwithstanding the unqualified language of the statute, the obligation to treat the reservist as if he were "constructively present" (*West, supra*, at 150) only exists where the employer can "reasonably accommodate" the reservist, and where such accommodation is not possible, the obligation disappears. (Pet. at 9 n. 6, Brief at 23-24, *West, supra*, at 150 n. 8.) Thus, petitioner, the government, and the Fifth Circuit not only create the "affirmative action" obligation and "constructive presence" concept out of whole cloth cut fresh for the occasion but then create a theory of "reasonable accommodation" to avoid the obvious constitutional problems generated by the "constructive presence" concept.[12] Under their theory the plain language of § 2021(b)(3) that:

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[11] While this Court has upheld state statutes requiring employers to compensate employees for "brief period[s]" up to four hours spent voting (*Day-Brite Lighting v. Missouri*, 342 U.S. 421 (1952) and requiring employers to pay employees absent on jury duty the difference between their regular wages and their jury pay (*Dean v. Gadsden Times*, 412 U.S. 543 (1973)), those decisions imply that requiring payment for extensive periods of time for which the employer receives no special benefit, such as would be involved with this statute, would raise serious constitutional questions.

[12] If petitioner were correct in asserting that § 2021(b)(3) applies to the time period of a reservist's absence for military duty, it is hard to understand how petitioner, the government, the Fifth Circuit, and the District Court below can take the position that their "constructive presence" concept only applies to weekend duty and not to the summer training session or other longer absences given the legislative history and

(Footnote continued on following page)

> "Any person . . . shall not be denied . . . [any] incident or advantage of employment because of *any* obligation as a member of a Reserve Component of the Armed Forces." (Emphasis added.)

becomes:

> "Any person . . . shall not be denied . . . [any] incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces [so long as any such person's employer may prevent such denial by taking affirmative action to reasonably accommodate such obligation, but not otherwise]."

Clearly, if Congress had intended § 2021(b)(3) to mean what petitioner, the government, and the Fifth Circuit says it means, it could have drafted that section to so provide. However, nothing in the language of the statute or its legislative history even remotely suggests Congress intended such a construction.[13]

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[12] *continued*
the plain language of the statute that discrimination is prohibited "because of *any* obligation as a member of a Reserve component. . . ." (emphasis supplied).

[13] The decision of the Seventh Circuit in *Carney v. Cummins Engine Co.*, 602 F.2d 763 (7th Cir., 1979), *cert. denied*, 444 U.S. 1073 (1980) also imposed an affirmative action obligation on employers under § 2021(b)(3) and is erroneous for that reason as well as for the initial decision to apply § 2021(b)(3) rather than § 2024(d) to the time period of a reservist's absence. The decision of the First Circuit in *Carlson v. New Hampshire Department of Safety*, 609 F.2d 1024, *cert. denied*, 446 U.S. 913 (1980), was correct to the extent that it found Carlson's transfer *after his return because* of his Reserve obligations to be a violation of § 2021(b)(3). However, the language in the second full paragraph on page 1027 of the opinion, to the extent it applies to incidents or advantages of employment occurring *during* the reservist's absence, is overbroad.

CONCLUSION

The Sixth Circuit was correct in finding that § 2021(b)(3) was meant to prevent discrimination against a reservist during the time period he is on the job between his Reserve absences and that such section requires only equal nondiscriminatory treatment and does not require affirmative action by an employer.

The construction of the Act urged on behalf of the petitioner by the government is without support in the language of the statute or its legislative history and its application would result in a violation of employers' Fifth Amendment rights.

Accordingly, the decision of the Sixth Circuit should be affirmed.

Respectfully submitted,

MARTIN J. KLAPER
DAVID L. GRAY
111 Monument Circle
Indianapolis, Indiana 46204
(317) 635-1213

Attorneys for Amicus Curiae Cummins Engine Co., Inc.

ICE, MILLER, DONADIO & RYAN
Of Counsel